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Supreme Court of the United States

October Term, 1974
No. 74-853

ESTATE OF ANTHONY GERACI, Deceased,
NORMA GERACI, Executrix,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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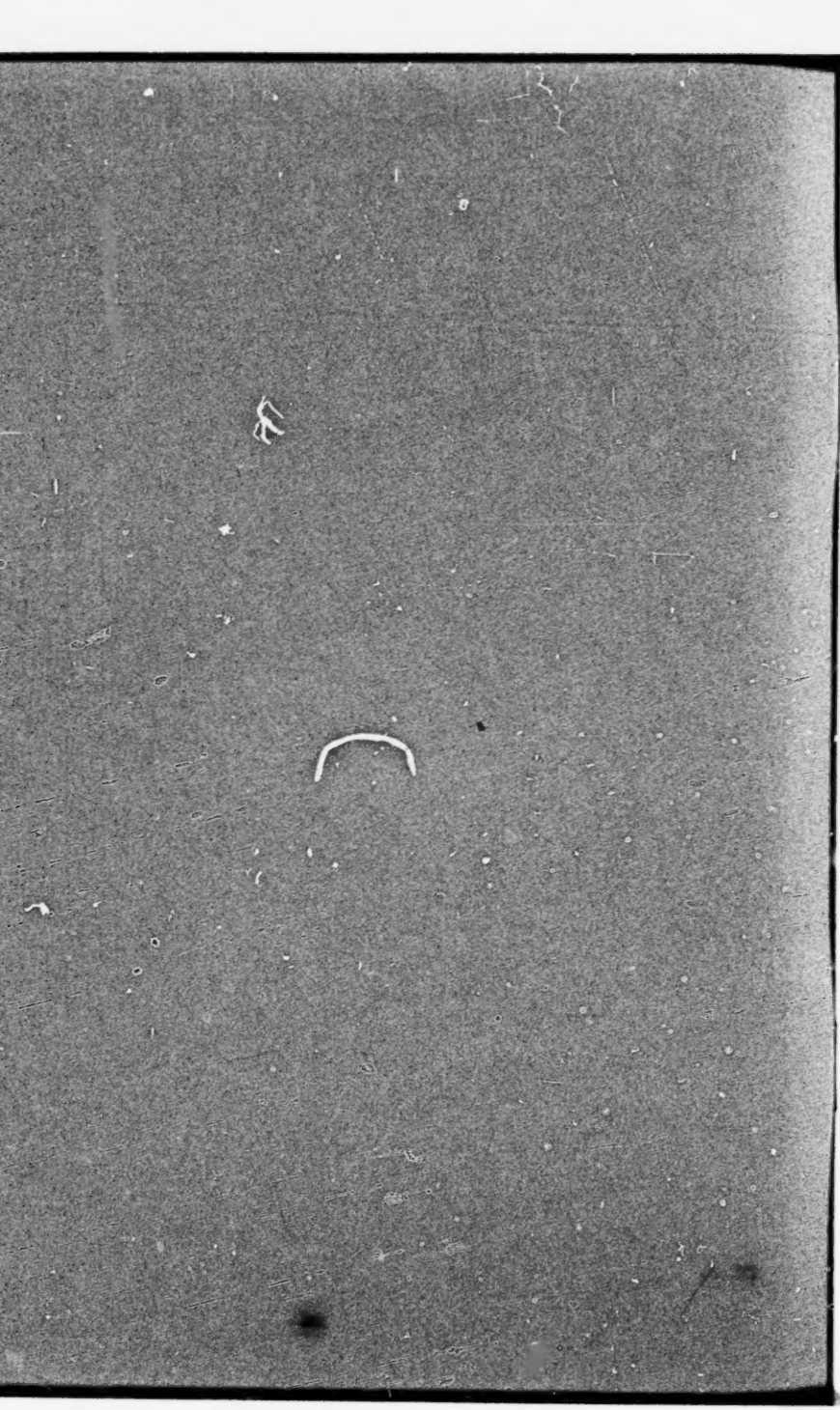

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ESTATE OF ANTHONY GERACI, Deceased,
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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Norma Geraci, Executrix of the Estate of Anthony Geraci, Deceased, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth District entered September 5, 1974, a timely filed Petition for Rehearing being denied October 14, 1974.

OPINIONS BELOW

The Memorandum Findings of Fact and Opinion of the Tax Court are presented in Appendix A. The Court of Appeals Decision and Judgment of September 5, 1974 appears as Appendix B of this Petition. The Order of the Court of Appeals Denying the Petition for Rehearing entered October 14, 1974 is printed as Appendix C.

JURISDICTION

The jurisdiction of this court is invoked for the reason that the decision of the Court of Appeals is in conflict with decisions of prior Court of Appeals decisions; and further, the issue presented is of great importance and of great general interest and one upon which there are a number of decisions (Appendix E) but has never been decided by this court.

QUESTION PRESENTED

The general question presented in this case is what constitutes reasonable cause under Section 6651 of the Internal Revenue Code.

The specific issue squarely before the court and the issue of great concern to all taxpayers, accountants and attorneys is whether or not a taxpayer can be held accountable for the admitted error of his accountant or attorney on a tax matter when the taxpayer relied entirely upon said person to handle the matter.

The herein case is unique in presenting this issue to the court for the reason that the facts on this issue were stipulated by the parties and was the only issue involved in the case.

STATUTES INVOLVED

The relevant sections of the Internal Revenue Code of 1954, 26 U.S.C. 6075 and 6651, are set forth in Appendix D hereto.

STATEMENT OF THE CASE

The decedent died on March 17, 1967. On May 1, 1967 the decedent's widow, Norma Geraci, was appointed executrix of the estate under the terms of the decedent's will. The estate tax return was due June 27, 1968 but was not filed until August 28, 1968. Accompanying the return was a letter signed by Rudolph J. Geraci, the attorney for the estate, which stated that "The reason for the late filing without obtaining an extension is that we were under the impression that the return was due 15 months from the date of the appointment of the executrix rather than the date of death."

The Commissioner asserted a fifteen percent penalty to the estate tax under Section 6651(a) based on the failure to file a timely return.

The taxpayer asserted that there was reasonable cause for the delay in that she relied entirely upon her attorney to prepare and file the tax return as well as handle the entire estate; and the attorney admittedly erred in calculating the date for filing the return.

The parties stipulated before trial of the matter in Tax Court that the taxpayer was a housewife with no income of her own and relied entirely upon the attorney for the estate to handle the entire estate.

The "trial" of the matter in Tax Court took about ten minutes since no evidence was introduced at the time

of the hearing before the Tax Court on these points and none further was requested by the court or other parties. The only evidence introduced at the time of the hearing was the attorney's testimony as to how it came to be that the error was made. This testimony took about ten minutes and was uncontroverted and stands unimpeached. Other than procedural discussions, the testimony of the attorney is all that is included in the transcript of the case.

REASON FOR GRANTING THE WRIT

Until fairly recently the law on point was clear. There were a number of court decisions which held that "reliance" by a taxpayer upon his accountant or attorney constituted "reasonable cause." (Appendix D).

In the case of *In re Fisk's Estate v. Commissioner of Internal Revenue*, 203 F.2d 358 in which the sole issue presented was exactly the same as the herein case, the Sixth Circuit Court of Appeals held that as a matter of law "reliance upon an attorney constitutes reasonable cause as a matter of law."

In the case of *Hatfried v. Commissioners*, 162 F.2d 628, the issue being the same, the Seventh Circuit Court of Appeals approved the rule that "reasonable cause means nothing more than the exercise of ordinary business care and prudence." "To hold that a taxpayer who selected as his agent a certified public accountant has failed to exercise 'ordinary business care and prudence' and becomes liable for the error of his advisor as 'agent' *is an inconceivable proposition.*"

The decision also held that "it is well-settled that in the application of penalties all questions of doubt must

be resolved in favor of those against whom the penalty is sought."

It was not until 1967 that this elementary principle of law was ostensibly disturbed by a Tax Court decision, *Duttenhofer v. Commissioners*, 49 TC 200, and *Ferrando v. Commissioners, et al.*, 245 F.2d 582, and most recently this case which "upheld" the rules set forth is the *Duttenhofer* case but did so "unenthusiastically."

The question of reasonable cause is now no longer an issue that can be argued or decided on case law since there is so much conflict and irreconcilable propositions of law on both sides.

Therefore, because of the conflict in the decision of what constitutes reasonable cause, it is presently a matter left to the sole arbitrary and capricious desire of the "field audit" taxmen to decide.

SUMMARY AND CONCLUSION

We believe this is too important an issue that may affect too many people to be left without a clear and decisive opinion by the Supreme Court.

Respectfully submitted,

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APPENDIX A

Opinion of United States Tax Court

(Filed April 26, 1973)

T. C. Memo. 1973-94

Docket No. 6523-71

UNITED STATES TAX COURT

ESTATE OF ANTHONY GERACI, Deceased, Norma Geraci, Executrix, Petitioner *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

TANNENWALD, *Judge*: Respondent determined a deficiency of $2,408.24 in petitioner's estate tax and an addition thereto under section 6651(a)[1] of $361.23.[2]

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1. Statutory references are to the Internal Revenue Code of 1954 as amended.

SEC. 6651. FAILURE TO FILE TAX RETURN OR TO PAY TAX.

(a) Addition to the Tax.—In case of failure—

(1) to file any return required under authority of subchapter A of chapter 61 * * * on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate;

2. The total amount of addition to tax under section 6651(a) is $4,182.46, of which $3,821.23 was previously assessed.

Petitioner having conceded all but one item involved in the deficiency notice, the sole issue remaining for decision is whether petitioner's failure to file an estate tax return within the prescribed time was due to reasonable cause and not due to willful neglect.

Anthony Geraci died on March 27, 1967, a resident of Shaker Heights, Ohio. Norma Geraci, decedent's widow, was appointed executrix of the estate on May 1, 1967, in accordance with the last will and testament of Anthony Geraci.

A Federal estate tax return was required to be filed within 15 months after the date of decedent's death. Section 6075(a). The due date for petitioner's estate tax return was therefore June 27, 1968. No extension of time for filing the return was granted under section 6081. Petitioner's estate tax return was not filed with the district director of internal revenue, Cleveland, Ohio, until August 28, 1968. The return as filed showed a gross estate of $378,041.28, a taxable estate of $118,784.67, and net estate tax payable of $25,474.85.

The attorney for the decedent's estate was out of his office due to illness for a period of six weeks to two months commencing at the end of May or in early June 1968. His office, consisting of two other attorneys besides himself, conducted a general practice.

In a letter accompanying the estate tax return, the attorney for decedent's estate stated that "[t]he reason for the late filing without obtaining an extension is that we were under the impression that the return was due 15 months from the date of the appointment of the executrix rather than the date of death."

Respondent has asserted a 15-percent addition to petitioner's estate tax under section 6651(a) for such failure to make a timely estate tax return.

In order to avoid the addition to tax under section 6651(a), petitioner has the burden of proof to establish that its failure to file the required return within the prescribed time was due to reasonable cause; merely demonstrating an absence of willful neglect does not satisfy that burden. *Paula Construction Co.*, 58 T.C. 1055, 1061 (1972), affirmed per curiam (C.A. 5, 1973, 31 A.F.T.R. 2d 73-926, 73-1 U.S.T.C. par. 9283). Reasonable cause exists when the person required to make the return establishes that he exercised ordinary business care and prudence. *Estate of Henry P. Lammerts*, 54 T.C. 420, 445 (1970), affirmed as to this issue, 456 F.2d 681, 683 (C.A. 2, 1972); section 301.6651-1(a)(3), Proced. & Admin. Regs. In this case, the executrix was the person required to file the return within the prescribed time. Section 6018(a)(1).

Whether the failure to file on time was due to reasonable cause is primarily a question of fact to be determined from all the circumstances in a particular case. *Estate of Frank Duttenhofer*, 49 T.C. 200, 204 (1967), affirmed 410 F.2d 302 (C.A. 6, 1969). Petitioner assigns the following facts as the basis of its contention that reasonable cause existed in the present case: (1) The executrix relied entirely upon the attorney for the estate to file the estate tax return; (2) the attorney was incapacitated by illness from June until late August of 1968; and (3) the attorney was under the mistaken impression, as he stated in a letter accompanying the return, that "the return was due 15 months from the date of the appointment of the executrix rather than the date of death."

We do not think that those facts constitute reasonable cause for the late filing. As we stated in *Estate of*

Henry P. Lammerts, supra at 446, an executor has "a positive duty to ascertain the nature of his responsibilities as such." This duty is not satisfactorily discharged by delegating the entire responsibility for filing the estate tax return to the attorney for the estate. The executor is required, at a minimum, to ascertain when the return is due and to take appropriate steps to see that the obligation to file is fulfilled; inexperience in handling the administration of an estate does not excuse the failure of an executor to take such action. *Ferrando v. United States,* 245 F.2d 582 (C.A. 9, 1957); *Pfeiffer v. United States,* 315 F. Supp. 392, 395-396 (E.D. Cal. 1970). See *Estate of Frank Duttenhofer, supra* at 204.

Neither do we think that the asserted illness of the attorney constitutes reasonable cause within the circumstances of this case. Assuming without deciding that the attorney's indisposition might, under certain circumstances, constitute reasonable cause, we do not think it constitutes a sufficient excuse in this case. There is no indication in the record that the executrix was unaware of such indisposition and no reason has been shown for her failure to make other provisions for the filing of the return or to seek an extension of time under section 6081 before the actual due date of the return. Moreover, the record indicates that the attorney had colleagues in his office who, for aught that appears, could have undertaken to make a timely filing of the return. *Robinson's Dairy, Inc. v. Commissioner,* 302 F.2d 42, 45 (C.A. 10, 1962), affirming 35 T.C. 601, 608 (1961).[3]

The third fact relied upon by petitioner—counsel's mistake as to the due date of the return—must fail for the same reason as the first. Cf. *Estate of Lammerts v. Com-*

3. See also *Estate of Louis Lewis,* T.C. Memo. 1963-331.

missioner, 456 F.2d 681, 683 (C.A. 2, 1972), affirming 54 T.C. 420 (1970).

This is not a case where there was a question as to whether a return needed to be filed, so that reliance upon expert advice might be considered reasonable cause. Cf. *Estate of Daisy F. Christ*, 54 T.C. 493, 553-554 (1970); *Estate of Michael Collino*, 25 T.C. 1026, 1035-1036 (1956). Nor does it involve a situation where the executrix had performed all the necessary acts preparatory to filing, including the execution of the return, relying upon her attorney to perform the necessary ministerial act to perfect compliance with the statutory requirement. It is in this latter respect that *In re Fisk's Estate*, 203 F.2d 358 (C.A. 6, 1953), reversing a Memorandum Opinion of this Court, is distinguishable. In that case, the return had obviously been completed in time and the only question was whether the ministerial act of the attorney in mailing the return on the day it was due rather than the next day, when the return was received, constituted a sufficient failure of compliance to warrant the conclusion that the "reasonable cause" requirement had been satisfied. The circuit court of appeals, in holding for the taxpayer, was obviously influenced by the shortness of the time gap involved.[4] The same situation obtained in *McIntyre v. Commissioner*, 272 F.2d 188 (C.A. 6, 1959), reversing per curiam a Memorandum Opinion of this Court. The narrow scope of these decisions is clearly revealed by *Estate of Duttenhofer v. Commissioner*, 410 F.2d 302 (C.A. 6, 1969), affirming 49 T.C. 200, 204 (1967), in which the same circuit court of appeals, in circumstances very similar to those involved herein, held that a five-month delay was not reasonable.

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4. In this connection, we note that timely mailing of a return now constitutes timely filing. Section 7502.

The key to our decision herein lies in the fact that the executrix played an entirely passive role and did not, as far as the record reveals, make any attempt to discharge her "positive duty." See *Estate of Henry P. Lammerts, supra* at 446. In this connection, we note that the record does not contain any direct testimony as to whether the executrix herein had actual knowledge that an estate tax return was required to be filed, but, given the size of the estate, it is not unreasonable to infer that she either did or should have had such knowledge. In any event, lack of knowledge that a return is required to be filed or of the due date thereof does not constitute reasonable cause. *Cronin's Estate v. Commissioner*, 164 F.2d 561, 566 (C.A. 6, 1947), affirming on this issue 7 T.C. 1403, 1414 (1946).

We conclude that reasonable cause for the late filing herein did not exist. Accordingly, the addition to tax is sustained.

In order to permit a possible deduction for expenses incurred in this proceeding (see Rule 51, Tax Court Rules of Practice),

Decision will be entered under Rule 50.

APPENDIX B

Opinion of United States Court of Appeals

(Decided and Filed September 5, 1974.)

No. 74-1230

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ESTATE OF ANTHONY GERACI,
Deceased, Norma Geraci,
Executrix,
Petitioner-Appellant

v.

COMMISSIONER OF INTERNAL
REVENUE
Respondent-Appellee

APPEAL FROM THE UNITED STATES TAX COURT

Before: PHILLIPS, Chief Judge, and WEICK and ENGEL, Circuit Judges.

PER CURIAM. The sole issue in this appeal is whether the failure of an Executrix to file a federal estate tax return within the prescribed time was due to reasonable cause and not due to willful neglect. Int. Rev. Code of 1954 § 6651 (a).

At the time of the decedent's death, March 27, 1967, a federal estate tax return was required to be filed "within 15 months after the date of the decedent's death." Int. Rev. Code of 1954, § 6075 (a). The due date for

the estate tax return in the present case was, therefore, June 27, 1968.

In accordance with § 6651 (a), the Commissioner asserted a 15 per cent addition to the appellant's estate tax, amounting to $4,182.46, for failure to file a return on time. Section 6651 (a) imposes a five percent addition for each month or fraction thereof for which the return is tardy, not to exceed 25 per cent. The 15 per cent addition in the present case was determined on the basis of the appellant's return being filed two months and one day late.

The appellant petitioned the United States Tax Court wherein she asserted that the following three reasons were sufficient to constitute reasonable cause for the tardy filing of the return: 1) The executrix, a housewife with no income of her own and little or no business experience, relied entirely on the attorney for the estate to file the return; 2) The attorney was incapacitated by illness during June and July of 1968; 3) The attorney was under the mistaken impression that "the return was due 15 months from the date of the appointment of the executrix rather than the date of death."

The Tax Court in an opinion prepared by Judge Theodore Tannenwald, Jr., found that the above factors did not constitute reasonable cause for the failure to timely file the return. 32 CCH Tax Ct. Mem. 424 (1973). We affirm because we cannot hold on this record that the findings of the Tax Court are clearly erroneous. Rule 52 (a), Fed. R. Civ. P. *Commissioner v. Duberstein*, 363 U.S. 278, 289-91 (1960); *Estate of Frank Duttenhofer v. Commissioner*, 49 T.C. 200, 204 (1967), aff'd, 410 F.2d 302 (6th Cir. 1969). *Compare, In re Fisk's Estate*, 203 F.2d 358, 359 (6th Cir. 1953).

Although we affirm, we do so unenthusiastically. The opinion of the Tax Court contains language critical of the "entirely passive role" of the executrix, 32 CCH Tax Ct. Mem. at 426, which we believe is unjustified. It was stipulated that the executrix was a housewife who had no income of her own. She had little or no business experience and it was further stipulated that she relied entirely on the attorney for the estate, a kinsman of her deceased husband, to file the federal estate tax return.

Counsel for the executrix states as follows in his reply brief:

> "[D]iscussions were had [between the executrix and him] as to what had to be done and when. *It would be unrealistic to assume that there was no discussion between the Executrix and the attorney as to what had to be done and when, how much money would have to be set aside for this tax and that tax, etc.*" (Emphasis in original.)

Further, counsel for the executrix states that after his illness he went to the office of the Estate and Gift Tax Group of the Cleveland District of the Internal Revenue Service (IRS), presumably prior to August 28, 1968, and orally requested an extension of time to file the estate tax return. Counsel states that an IRS employee informed him that the penalty set forth in the statute was seldom enforced where the return was filed within a reasonable time and there was some reason for delay. Counsel did not make the application for extension of time in writing as required by Treas. Reg. § 1.6081-1 (b) (1), and there is no verification in the record of any aspect of his conversation with IRS employees in the Cleveland District.

Section 6651 (a) places the burden on the taxpayer of proving that the failure to timely file a federal tax

return was "due to reasonable cause and not due to willful neglect." Absent such a showing by the taxpayer, imposition of the addition is mandatory. *Cf. Fidelity & Columbia Trust Co. v. Commissioner,* 90 F.2d 219, 223 (6th Cir.), *cert. den.,* 302 U.S. 723 (1937). Although we are sympathetic with the plight of the executrix and would have preferred that the IRS have settled this matter at the administrative level and thereby avoided a harsh result, we cannot reverse the decision of the Tax Court on the record before us.

Affirmed.

APPENDIX C

Order of Court of Appeals Denying Rehearing

(Filed October 14, 1974)

No. 74-1230

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ESTATE OF ANTHONY GERACI, Deceased
NORMA GERACI, Executrix,
Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

ORDER DENYING PETITION FOR REHEARING

Before PHILLIPS, Chief Judge, and WEICK and ENGEL, Circuit Judges.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ John P. Hehman
Clerk

APPENDIX D

Statutes Involved

Internal Revenue Code of 1954 (26 U.S.C.):

Sec. 6075. *Time for Filing Estate and Gift Tax Returns.*

(a) *Estate Tax Returns.*—Returns made under section 6018(a) (relating to estate taxes) shall be filed within 15 months after the date of the decedent's death.

* * * * *

Sec. 6651. *Failure to File Tax Return.*

(a) *Addition to the Tax.*—In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

* * * * *

APPENDIX E

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